

1987

Cantwell Brothers Lumber Co., Inc. v. K Craig Loosle : Brief of Appellant

Utah Court of Appeals

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Jeff R. Thorne; attorney for appellant.

Gary O. McKean; attorney for respondent.

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870261-CA

IN THE UTAH COURT OF APPEALS

CANTWELL BROTHERS LUMBER
CO., INC.

)

Plaintiff and,
Respondent

)

No. 870261-CA

vs.

)

CASE TYPE: Appeal

K. CRAIG LOOSLE,

)

Defendant and
Appellant,

)

PRIORITY NUMBER 14b

BRIEF OF APPELLANT

Appeal from the First Judicial District
Court of Cache County
The Honorable VeNoy Christoffersen, Presiding

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IN THE UTAH COURT OF APPEALS

CANTWELL BROTHERS LUMBER
CO., INC.

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Plaintiff and,
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Defendant and
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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the trial court's failure to enter Findings of Fact and Conclusions of Law make the judgment void?
2. Are there factual issues raised by the pleadings and discovery such that summary judgment was improper?
3. Did the trial court commit reversible error by failing to rule upon the defendant's Motion filed pursuant to Rule 60(b) to Set Aside the Summary Judgment?

STATEMENT AND NATURE OF PROCEEDINGS

This is an appeal from a Summary Judgment Order entered by the First Judicial District in and for Cache County, State of Utah, in favor of the plaintiff and against the defendant, which Order was dated the 24th day of February, 1987.

STATEMENT OF FACTS

The plaintiff filed a Complaint against the defendant seeking to collect certain money alleged to be due and owing on open account. The Complaint was filed July 8, 1986.

(R.1)

The defendant filed an Answer on July 18, 1986. (R.4)

Limited discovery took place; the plaintiff filed Interrogatories (R.8) and Requests for Admissions (R.13), the defendant filed Answers to Admissions (R.16) and Answers

to Interrogatories (R.18) wherein the amount of indebtedness was disputed and factual issues were raised. The Answers to Interrogatories were signed by the defendant and verified. A copy is attached hereto as addendum. Answers 9, 12, 13 and 14 raise factual issues.

A Motion for Summary Judgment was filed by the plaintiff against the defendant on October 7, 1986. (R.24) For some period of time the motion was held in abeyance while the parties attempted to negotiate a settlement.

The plaintiff then asked that the Motion for Summary Judgment be determined by the court. (R.35) The court apparently called the defendant's then counsel on more than one occasion and asked for a response to be filed, but no response was ever filed by the then counsel for the defendant and the court issued a Memorandum Decision dated February 3 1987. (R.36) An Order of Summary Judgment was entered on February 24, 1987. (R.40) The defendant never received actual notice of the pendency of the Motion for Summary Judgment nor did he receive any word from his then attorney that a response was due to the pending motion. (R.59)

After receiving notice to appear on a supplemental order, the defendant found out for the first time that judgment had been entered against him. (R.58-59)

On or about April 20, 1987 the defendant filed a motion pursuant to Rule 60(b) of Utah Rules of Civil Procedure to set aside the summary judgment matter and accompanied the

same by affidavits (R. 53-57; R.58-61) and a memorandum of points and authorities. (R. 62-68)

Because it was unclear whether a Rule 60(b) motion stays the time for appeal, the defendant also filed a Notice of Appeal in order to protect his appellate rights.

The court issued a Memorandum Decision dated May 20, 1987 stating that since a Notice of Appeal had been filed that the trial court had no further authority to rule on the matter.

No formal Findings of Fact and Conclusions of Law on the summary judgment decision nor on the Memorandum Decision dated May 20, 1987 have been signed and filed with the court.

SUMMARY OF ARGUMENTS

1. Decisions of the Utah Supreme Court have repeatedly held that the failure of a trial court to enter Findings of Fact and Conclusions of Law on a judgment void the judgment matter.

2. Numerous decisions of the Utah Supreme Court have held that summary judgment is valid only if there are no factual issues and the plaintiff would be entitled to judgment as a matter of law. In this case factual issues were raised by the pleadings and discovery matters, and summary judgment was improperly granted.

3. The failure of the trial court to issue a ruling on the defendant's 60(b) motion to set aside the prior summary judgment is grounds for reversal.

POINT I

PURSUANT TO DECISIONS OF THE UTAH STATE SUPREME COURT, THE FAILURE TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE JUDGMENT VOID THE JUDGMENT MATTER.

Even though the court issued a memorandum decision and signed a summary judgment order, the record does not reflect that any Findings of Fact and Conclusions of Law have been filed. Pursuant to present Utah State Supreme Court decisions, the failure to do so voids the action and requires that the judgment be vacated. See Parks v. Zions First Nat. Bank, 673 P.2d 590, 601 (Utah 1983); Anderson v. Utah County Bd. of County Comm'rs, 589 P.2d 1214, 1215 (Utah 1979).

Utah Rules of Civil Procedure Rule 52(a) mandates in all actions tried without a jury that:

[t]he court shall find the facts specially and state separately its conclusions of law thereon,..."

In Boyer Co. v. Lignell, 567 P.2d 1112, 1113 (Utah 1977) the Supreme Court stated:

"The law is well settled that it is the duty of the trial judge in contested cases to find facts upon all material issues submitted for decision unless findings are waived."

POINT II

SUMMARY JUDGMENT IS VALID ONLY IF THERE ARE NO FACTUAL ISSUES AND THE PLAINTIFF WOULD BE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

In this case there are factual issues raised by the

pleadings. As stated in the affidavit (R. 58-60) accompanying the Rule 60(b) motion there are factual issues raised by the defendant's Answers to Interrogatories (R. 18-23) regarding the charging of materials against K. Craig Loosle's account with the plaintiff. Also, a factual issue was raised that defendant's father had contacted Cantwells and had been told by Cantwells that the charges for Don Loosle's materials would not be assessed against this defendant. (R. 22)

Additionally, the Response to Requests for Admissions also placed factual issues in dispute. (R. 16-17)

Decisions of the Utah State Supreme Court state where the pleadings, evidence, admissions and interrogatories show there are genuine issues of material fact, summary judgment is improper. See Frederick May and Co., V. Dunn, 13 Utah 2d 40, 368 P.2d 266 (1962), Union Bank v. Swenson, 707 P.2d 663 (Utah 1985).

POINT III

THE FAILURE OF THE TRIAL COURT TO
ISSUE A RULING ON THE DEFENDANT'S
60(b) MOTION IS GROUNDS FOR SUMMARY
REVERSAL OF THE ACTION.

Rule 60(b) provides as follows:

"On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore

denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

The Utah Supreme Court has stated that the court cannot act arbitrarily in the denial of a motion to set aside a judgment, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformance with law and justice. See Mayhew v. Standard Gilsonite Company, 14 Utah 2d 52, 376 P.2d 951 (1962). In this case the court also stated:

"[i]t is quite uniformly regarded as an abuse of discretion to refuse to vacate a...judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside."

It is undisputed in this case that the former counsel for defendant failed to communicate with defendant or apprise him that summary judgment was pending. The failure to apprise the defendant basically denied him an ability to defend his action, and when he was served with a Motion for Supplemental Order, the defendant felt and still feels that the judgment was entered by the mistake and inadvertence of his counsel. The failure of his counsel to apprise the defendant does constitute surprise and excusable neglect on behalf of the defendant, all of which is set forth in defendant's Rule 60(b) motion to set aside the summary judgment. (R.51).

While the actions of his former counsel in not responding or not advising him are reprehensible and perhaps contrary to the code of ethics and perhaps actionable, still the defendant is faced with the prospect of having a judgment entered against him to which he does not believe he is legally obligated, and for which he has a defense.

The trial court is endowed with considerable discretion in granting or denying motions to set aside judgments. (see Mayhew, above). The Utah Supreme Court has ruled that where any reasonable excuse is offered by a party against whom judgment is granted the courts generally tend to favor granting relief from a judgment unless it appears to do so would result in substantial injustice to the adverse party. See Westinghouse Electric Supply Co., vs Paul W. Larson Contractor Supply, 544 P.2d 876 (Utah 1985).

Because it was unclear whether a Rule 60(b) motion stays the time for appeal, (see First Sec. Bank v. Neibaur, 570 P.2d 276 (Idaho 1977)) the defendant also filed a Notice of Appeal (R.69) in order to protect his appellate rights.

The failure of the trial court to rule upon the Rule 60(b) motion constitutes manifest error and the case should be remanded for a ruling on the defendant's motion.

CONCLUSION

The defendant therefore requests that this court issue an order summarily reversing the trial court's summary judgment action and directing the trial court to set aside the judgment, to allow the parties to complete discovery and have the matter tried upon its merits.

RESPECTFULLY submitted this 19 day of August, 1987.

MANN, HADFIELD & THORNE

By JS
Jeff R. Thorne
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) copies of the foregoing Respondent's Brief to the following:

Gary O. McKean
Attorney for Respondent
67 East 100 North
Logan, Utah 84321

JS
Secretary

Stephen J. Plowman
Attorney for Plaintiff
755 South 200 West
Richmond, UT 84333
Telephone: (801) 258-2458

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

CANTWELL BROTHERS LUMBER CO., :
INC. :
Plaintiff, : DEFENDANT'S RESPONSE TO
vs. : PLAINTIFF'S FIRST REQUEST
K. CRAIG LOOSLE : FOR INTERROGATORIES
Defendant. : Civil No. 24996
:

Defendant answers Plaintiff's first set of
interrogatories as follows:

INTERROGATORY NO. 1:

Please state your name, residential address, business
address, nature of business or occupation, and name of business
owned.

ANSWER: K. Craig Loosle. 573 East 1980 North, Logan,
Utah. Work address is the same. General construction under the
name of K. Craig Loosle Construction.

INTERROGATORY NO. 2:

Number 24996-7

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SETH S. ALLEN, Clerk

by SG Deputy

Please state if you are currently, as well as whether you were during the period April 22, 1983, through March 11, 1985, engaged in a business known as "Craig L. Construction". If so, please state the names, residential addresses, and interests of all owners, partners, or shareholders of the business; whether or not the business is or was a sole proprietorship, partnership, or corporation; and if incorporated, the names and addresses of its officers and directors.

ANSWER: No. The name of the enterprise was K. Craig Loosle Construction, a sole proprietorship operated at the address indicated above.

INTERROGATORY NO. 3:

Please state your occupation or business during the period April 22, 1983, to March 11, 1985, and the name of any business which you owned or operated or the name and address of any employer during that period.

ANSWER: General contracting and a construction employee. The name is found in the Answer to Interrogatory No. 2.

INTERROGATORY NO. 4:

Please state the name and branch of any bank or savings and loan association with whom you maintained checking or other accounts for Craig L. Construction or in your name for said business or similar business during the period April 22, 1983, to March 11, 1985, together with account numbers thereof.

ANSWER: Objected to for lack of relevance.

INTERROGATORY NO. 5:

Please state the account number and name of any charge accounts opened and maintained by you individually, or doing business as Craig L. Construction or any other business with the Plaintiffs which were either opened or maintained during the period April 22, 1983, through March 11, 1985.

ANSWER: Objected to for lack of relevance.

INTERROGATORY NO. 6

Please state what documents are in your possession or in the possession of your attorney, agent, employees, or otherwise regarding the establishment in terms of all charge account with the Plaintiff including, but not limited to, credit agreements, account terms and conditions, use authorization restrictions, or correspondence. Please provide photo copies thereof or in the alternative state when and where Plaintiff may make copies thereof.

ANSWER: The only terms of open account are in Plaintiff's possession and were provided as an addendum to the Complaint.

INTERROGATORY NO. 7

Please state all business dealings and relationships you have had individually or doing business as Craig L. Construction with the building project located at approximately 2150 North Main Street (Highway 91) in North Logan, Cache County, Utah and with Donald C. Loosle with respect to said building, property and project during the period May 22, 1983, to March 11, 1985.

ANSWER: The building project was administered by Donald C. Loosle who retained me and paid me according to the time I spent on the project.

INTERROGATORY NO. 8:

Please state if you placed any restrictions on the charge account with Plaintiff. If so, please specify and provide copies of the exact restrictions, the manner, time, and place, in which given and to whom given and provide together therewith copies of any other documentation regarding such restrictions.

ANSWER: No restrictions were placed on the account.

INTERROGATORY NO. 9:

Please state any and all defenses you may claim to this action.

ANSWER: See Defendant's Answer.

INTERROGATORY NO. 10

Please state the name, address, and telephone number of all potential witnesses you may call with respect to this action.

ANSWER: Donald C. Loosle, 2048 North 1300 East, Logan, Utah 752-4890.

INTERROGATORY NO. 11:

Have you, or anyone on your behalf, made any payment or payments on account with Plaintiff for which you have not received the credit? If so, please state the amount, time, place, and person to whom such payment or payments were made and attach copies of any receipts.

ANSWER: No.

INTERROGATORY NO. 12:

Have you, or anyone on your behalf, ever notified Plaintiff that the account claimed by Plaintiff to be due to it was not in fact due to it? If so, please state to whom this notification was given, when it was given, and how it was given.

ANSWER: Donald C. Loosle had a personal conversation with Wayne Cantwell wherein it was made known to Mr. Cantwell that certain materials, which are the subject matter of this action, were to be purchased and supplied to the project described in Interrogatory No. 7 for Donald C. Loosle.

INTERROGATORY NO. 13:

Are you indebted to the Plaintiff in any sum whatsoever? If so, please state the amount of such indebtedness, what the indebtedness was incurred for, and whether you intend to pay such indebtedness.

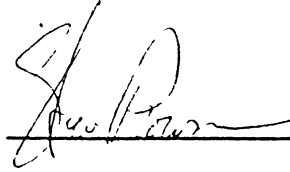
ANSWER: Yes, I am indebted to Plaintiff on an account with an outstanding balance of \$750.00 which I intend to pay.

INTERROGATORY NO. 14:

Please state whether or not you ever specifically informed the Plaintiff that Don Loosle was not authorized to make purchases on your account with the Plaintiff during the period May 22, 1983, through March 11, 1985. If you claim that such notice was given, please provide a copy thereof and state to whom the notification was given, when it was given, and in the manner in which it was given.

ANSWER: No specific notice was given to Plaintiff.

Dated this 21st day of September 1986.

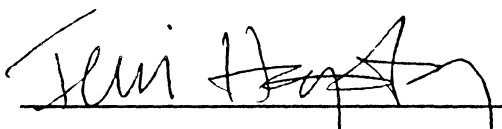


Stephen J. Plowman
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing DEFENDANT'S RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR INTERROGATORIES to the following, postage prepaid on this 4th day of September, 1986.

Gary O. McKean
Jenkins, McKean & Associates
67 East 100 North
Logan, UT 84321

By 
Terri Lynn Hampton

tlh

Gary O. McKean A2201
JENKINS, McKEAN & ASSOCIATES
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Telephone: (801) 752-4107

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

CANTWELL BROTHERS LUMBER CO., INC.,)
a Utah corporation,)

Plaintiff)

vs.)

K. CRAIG LOOSLE,)

Defendant)

SUMMARY JUDGMENT

Civil No.

Based upon the pleadings filed herein and the court's memorandum decision dated February 3, 1987, a summary judgment is hereby entered in favor of Plaintiff, CANTWELL BROTHERS LUMBERS CO., INC., against the Defendant, K. CRAIG LOOSLE, in the sum of \$19,690.48 representing principal in the amount of \$11,876.18 and interest accrued as of February 28, 1987, in the amount of \$7,814.30; in the sum of \$84.94 for costs accrued to date; in the sum of \$ 1,800.00 for Plaintiff's attorneys fees; and for such sums in addition thereto as Plaintiff may reasonably incur in attorneys fees and costs in enforcing and collecting this judgment and making proof thereof to this court hereafter, together with interest on the judgment at the rate of 2% per month from February 28, 1987.

DATED this 24th day of February 1987.

District Judge

cant/loo.jud d.56 jjb

FILED
FEB 27 1987
CLERK OF DISTRICT COURT
CANTWELL BROTHERS LUMBER CO.

244946

Jeff R. Thorne of Mann, Hadfield & Thorne, #3250
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IN THE FIRST DISTRICT COURT, CACHE COUNTY, STATE OF UTAH

CANTWELL BROTHERS LUMBER CO.,)
INC.,

Plaintiff,)

MOTION TO SET ASIDE
SUMMARY JUDGMENT

vs.)

K. CRAIG LOOSLE,)

Civil No. 24996

Defendant.)

Comes now the defendant, K. Craig Loosle, by and
through his attorney of record, Jeff R. Thorne of the firm
of Mann, Hadfield and Thorne, and moves the court for an
order setting aside the "summary judgment" dated February
24, 1987 and in support of said motion alleges as follows:

1. Rule 60(b) of the Utah Rules of Civil Procedure
states:


"On motion and upon said terms as are just, the
court may in the furtherance of justice relieve a
party or his legal representative from a final
judgment, order or proceeding for the following
reasons:

(1) mistake, inadvertence, surprise, or excusable
neglect;...

(7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was taken."

The defendant alleges that pursuant to this rule he is entitled to have the summary judgment dated February 24, 1987 set aside pursuant to the factual bases alleged in his affidavit and in support of this motion the defendant is attaching his affidavit and his Memorandum of Points and Authorities.

DATED this 10 day of April, 1987.



Jeff R. Thorne
MANN, HADFIELD & THORNE
Attorneys for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 21 day of April, 1987, I mailed a copy of the foregoing Motion to Set Aside Summary Judgment to Gary O. McKean, Attorney for Plaintiff, 67 East 100 North, Logan, Utah 84321.



Secretary